

October 14, 2003

Filed Electronically

**EX PARTE**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: WC Docket No. 03-194 - *In re: Application by Qwest Communications International Inc. for Authority to Provide In-Region, InterLATA Services in Arizona*

Dear Ms. Dortch:

Eschelon submits this Ex Parte letter regarding the application of Qwest Communications International, Inc. ("Qwest") for authorization under Section 271 of the Communications Act for authority to provide In-Region, InterLATA services in Arizona. Eschelon is also available to discuss these issues, if desired.<sup>1</sup>

On September 29, 2003, Qwest filed an Ex Parte letter ("Qwest Ex Parte C"), which Qwest said it was "filing at the request of the Department of Justice ["DOJ"] to clarify its policy with respect to constructing DS1 loop facilities." Earlier, the DOJ had asked Eschelon for information about this same issue. Eschelon filed a copy of the materials that it had provided in response to the DOJ with the Federal Communications Commission ("FCC") on September 19, 2003 ("Eschelon Ex Parte").<sup>2</sup> Eschelon responds to statements in Qwest's Ex Parte C in this letter. In addition, now that the FCC has granted Qwest's 271 applications in all of its states except Arizona, Qwest has commenced anti-competitive advertising campaigns that require review. The manner in which Qwest is using its technicians in these advertisements and winback efforts also raises questions. Both of these issues are addressed in this letter.

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<sup>1</sup> Eschelon understands that Reply Comments are due on October 17, 2003. If the FCC for any reason deems these comments to be Reply Comments, please note that the fact that Eschelon only responds to the one Qwest Ex Parte filing does not in any way suggest that Eschelon's silence on other issues means agreement. Resource constraints prevent a full response to all issues, but Eschelon had to respond to the particularly egregious misstatement with respect to the DS1 capable loop issue.

<sup>2</sup> In response to a request from the FCC to number the pages consecutively, Eschelon re-filed the materials again in an electronic filing on October 8, 2003. Page numbers referred to here are the page numbers from the October 8, 2003 filing.

### **Dramatic Increase in Rejection of DS1 Capable Loop Orders**

Eschelon and other Competitive Local Exchange Carriers (“CLECs”) described the DS1 capable loop issue in Comments and Reply Comments filed with the Arizona Corporation Commission (“ACC”),<sup>3</sup> and Eschelon also did so in its previous Ex Parte filing in this matter.

Qwest attempts to minimize the DS1 capable loop problem, claiming that it resulted from a mere “clarification” that was “viewed as a policy change by some.” *See* Qwest Ex Parte C, p. 1. Qwest’s conduct, however, had a dramatic impact on the CLEC community, including Eschelon. Twelve CLECs joined in opposition to Qwest’s conduct,<sup>4</sup> and additional CLECs opposed Qwest’s conduct during a conference call to discuss the issue in August of 2003. The impact of Qwest’s conduct was sudden and significant. After Eschelon received only 3 DS1 service inquiry (no build) jeopardy notices in Arizona for the first half of 2003, the number jumped so that approximately **fifty percent** of Eschelon’s DS1 orders went held for no facilities between June 15, 2003 and August 15, 2003 *in Arizona*. Across the six states in Qwest territory where Eschelon does business, there was an overall **thirty-fold** increase in DS1 service inquiry (no build) jeopardy notices. It is not simply Eschelon’s “view” that the number increased. The sudden jump is a fact. Qwest’s tactic of calling its conduct a “clarification,” rather than a “change,” does not reduce the significant and sudden nature of the change.<sup>5</sup> Nor does it decrease the harm that Qwest caused to its competitors.<sup>6</sup> For example, Cbeyond, which experienced an almost **twenty percent** jump in these held orders from the start, reported that Qwest’s policy change had “crippled” its ability to compete.<sup>7</sup>

Qwest also attempts to minimize the nature of the change by indicating that “prior to June 16, CLECs were not always charged for such construction.” *See* Qwest Ex Parte C, p. 1. Before June 16, 2003, Qwest **never** charged construction charges for the activities newly deemed to be “construction” activities. Qwest did not deem these activities to be construction at all.<sup>8</sup> Only after Qwest implemented its change (aka “clarification”) did Qwest unilaterally deem activities to be “construction” that not only resulted in additional charges but also significant delays. The orders that constitute the entire thirty-fold increase in DS1 service inquiry (no build) jeopardy

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<sup>3</sup> Eschelon’s Comments Regarding Second Staff Report, AZ Docket No. T-00000A-97-0238 (July 18, 2003), pp. 4-11; Eschelon’s Reply Comments Regarding Second Staff Report, (same AZ Docket No.) (July 25, 2003), pp. 9-12; *see also* Reply Comments (July 25, 2003) by AT&T, Covad, MTI, and WCOM.

<sup>4</sup> *See* 12-CLEC Proposal, p. 97, Eschelon Ex Parte (Oct. 8, 2003).

<sup>5</sup> Moreover, Qwest admitted to the ACC that this was, in fact, a “change.” *See* Transcript, Special Open Meeting, ACC Docket No. T-00000A-97-0238, p. 40, lines 6-10 and p. 42, line 3.

<sup>6</sup> Qwest’s performance results will not reflect this harm, because its performance measures do not capture these problems. The provisioning measures are based on completion, and these orders do not complete.

<sup>7</sup> Verified Accelerated Formal Complaint of Cbeyond Communications, LLC Against Qwest Corporation, Colorado Public Utilities Commission, Docket No. 03F-357T, ¶ 7 & ¶ 31 (August 11, 2003).

<sup>8</sup> “Pursuant to that document [Qwest CRUNEC policy], Qwest did not impose construction charges on requests that could be resolved through facility work or assignments. . . . Thus, line conditioning historically had not been subject to ‘construction’ charges’. . . .” *See* Reply Comments of Mountain Telecommunications, Inc., Regarding Staff’s Second Report, AZ Docket No. T-00000A-97-0238 p. 2 (July 25, 2003).

notices that Eschelon experienced in Qwest territory after June 15, 2003, involve activities for which Qwest charged no construction charges before June 15, 2003 but claimed after June 15, 2003 would result in such charges, if they were processed at all. Qwest's statement that "prior to June 16, CLECs were not always charged for such construction" is therefore very misleading. Qwest did not charge construction charges for these activities before June 15, 2003. Qwest recovers the costs for these activities in the recurring and non-recurring rates established by the ACC.

Qwest unilaterally implemented a significant change, and it did so in an improper manner. In the ACC's 271 Order, the Commission reported that "Staff is extremely concerned that Qwest would implement such a significant change through its CMP process without prior Commission approval." See ACC Decision No. 66242, Docket No. T-00000A-97-0238, ¶109 (Sept. 16, 2003). After CLECs complained about this issue to state commissions and the FCC, Qwest finally reversed its position. Qwest claimed, however, that its decision to do so was "interim" only. Qwest dropped the "interim" designation only after the ACC addressed this issue in the Arizona 271 proceeding. During the ACC Open Meeting on September 8, 2003, counsel for Qwest committed to return "100%" to the processes in place before June 2003.<sup>9</sup> The question now is for how long. That Qwest is so nonchalant, unapologetic, and misleading about disruptive conduct that seriously harmed its competitors and which was expressly rejected by the ACC<sup>10</sup> does not bode well for the future.

Qwest should not be allowed to re-implement such a unilateral change, because of the adverse impact on end user customers, CLECs, and competition. If the FCC approves Qwest's 271 application for Arizona, the FCC should point out to Qwest that the FCC has addressed "construction" and the definition of "routine network modifications" in its Triennial Review Order.<sup>11</sup> Consistent with that Order, Qwest should not be allowed to unilaterally define construction in a manner that imposes costs and delay on CLECs without commission approval.

### **Qwest Advertising Campaigns and Technician Role in Winbacks**

Now that Qwest has received 271 approval in all but one of its states, Qwest has commenced two advertising campaigns that raise questions about the post-271 approval environment. Qwest's use of its technicians in these advertisements and winback efforts also raises serious questions.

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<sup>9</sup> In Qwest Ex Parte C, Qwest appears to back away somewhat from this commitment, indicating that "Qwest's current DS1 loop construction policy is materially the same as the policy that had been applied to CLECs before June 16."

<sup>10</sup> See ACC Decision No. 66242, Docket No. T-00000A-97-0238, ¶109 (Sept. 16, 2003).

<sup>11</sup> Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of the Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, ¶¶ 631-40 (Aug. 21, 2003).

In the first campaign, Qwest states that other telephone companies (“CLECs”) are dropping the ball, and Qwest is picking it up. *See* Attachment 9 to Exhibit 1. The advertisement depicts a Qwest Central Office (“CO”) Technician who connects a CLEC customer directly to the Qwest retail business office and stays on the line to ensure a Qwest winback. The advertisement, which relates to Qwest unlimited local and long-distance for business, is on the Qwest wholesale web site, which is accessible to individuals in all 14 of Qwest’s states.<sup>12</sup> Problems with this advertisement are discussed in the enclosed Supplemental Comments, which Eschelon filed recently with the Minnesota Public Utilities Commission. *See* Exhibit 1. Qwest ran the advertisement in the *Star Tribune* again today, despite Eschelon’s notice to Qwest of its objections through its filing in Minnesota.<sup>13</sup>

In the second campaign, Qwest depicts a technician and a Qwest line truck in a television commercial and indicates the technician is working on the network. Qwest’s message in the commercial is to the effect that, no matter which carrier’s name appears on a customer’s bill, Qwest is still the one providing the service.<sup>14</sup> This commercial has aired recently in at least the states of Arizona and Washington.<sup>15</sup> Over the last several years, the state commissions have spent a lot of time on issues such as branding,<sup>16</sup> single points of contact, party responsibility, and related issues to ensure that end user customers are not misled or confused about the identity of their carrier. In a single commercial, Qwest has interjected the very confusion and problems that should have been avoided by the mechanisms that have been put in place to allegedly ensure a non-discriminatory competitive environment.

For example, the Arizona Statement of Generally Available Terms (“SGAT”) specifically provides:

Neither Party shall without the express written permission of the other Party, state or imply that: 1) it is connected, or in any way affiliated with the other or its Affiliates; 2) it is part of a joint business association or any similar arrangement with the other or its Affiliates; 3) the other Party and its Affiliates are in any way sponsoring, endorsing or certifying it and its goods and services; or 4) with respect to its marketing, advertising or

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<sup>12</sup>See <http://www.qwest.com/unlimitedbiz/>. A footnote in the advertisement states: “Not available in AZ.”

<sup>13</sup> The Minnesota commission has not yet addressed the issue, which was only recently brought to its attention after the advertisement ran in the Minnesota newspaper.

<sup>14</sup> On September 27, 2003, at approximately 1:00 pm on the NBC channel in Washington, for example, the Qwest commercial depicted a Qwest technician named Scott who says: “Even if you do write your checks to some of the other phone companies, I am still the one that makes sure your calls get through.” The commercial begins with Scott’s beeper going off at night, and he talks about a sense of urgency while showing his sleeping child before he leaves to get in his Qwest line truck.

<sup>15</sup> Because this is a television commercial, Eschelon cannot provide a printed copy with this filing. The FCC should ask Qwest to provide it with a taped copy so that the FCC may evaluate it.

<sup>16</sup> The Arizona SGAT provides that “Qwest shall use unbranded Maintenance and Repair forms while interfacing with CLEC End User Customers.” *See* AZ SGAT § 12.3.2.1. The current Arizona interconnection agreement between Qwest and Eschelon also provides for providing unbranded information in some circumstances. *See* AZ ICA, Part A, § 8. The purpose of these provisions, however, is defeated when Qwest first tells the CLEC’s end user customers, through its commercials, that Qwest is actually providing the service.

promotional activities or materials, the resold goods and services are in any way associated with or originated from the other or any of its Affiliates. Nothing in this paragraph shall prevent either Party from truthfully describing the Network Elements it uses to provide service to its End User Customers, provided it does not represent the Network Elements as originating from the other Party or its Affiliates in any marketing, advertising or promotional activities or materials.

*See* AZ SGAT ¶ 5.10.5.<sup>17</sup> In its “promotional activities” Qwest is implying that resold goods and services “originated with” Qwest, in violation of this provision. *See id.* (sub-paragraph 4).

In addition, with respect to entirely facilities-based service, Qwest’s suggestion simply is not true. When the purely facilities-based carrier’s name is on the bill, Qwest is not providing the service. At a time when the FCC appears to be encouraging more facilities-based competition, Qwest’s inaccurate promotional statements harm the very competitors who are engaging in such competition.

In both of these advertising campaigns, Qwest relies on its technicians to deliver its message. Qwest uses the same technicians for both retail and wholesale work. Those individuals are in a position, therefore, to access wholesale information and misuse it for improper winback activity. A Qwest technician recently did so in Arizona. The Qwest technician working in a wholesale capacity on an Eschelon repair noted, when closing the repair ticket, that the technician had made a referral to the Qwest retail business office for a winback. *See* Attachment 8 to Exhibit 2. Qwest exploited carrier-to-carrier information about an outage to attempt to winback a customer. Eschelon describes this problem in the enclosed Supplemental Comments, which Eschelon filed recently with the Minnesota Public Utilities Commission. *See* Exhibit 2. If Qwest uses technicians to circumvent the rules on use of Customer Proprietary Network Information and winback activity, this back-sliding activity will harm competition, as well as competitors.

Qwest’s pending 271 application represents a last chance to use the incentive of Section 271 before approval to ensure proper practices are in place – and will remain in place – to ensure a meaningful opportunity to compete. The FCC should use this opportunity to address these issues with Qwest before any approval to avoid additional problems after approval.

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<sup>17</sup> *See also* AZ SGAT, ¶ 5.25.1, which states: “Neither Party shall publish or use any publicity materials with respect to the execution and delivery or existence of this Agreement without the prior written approval of the other Party.”

Marlene H. Dortch  
October 14, 2003  
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Eschelon appreciates the opportunity to submit this letter.

Sincerely,

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